Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber)

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/17/0122

57 Eglinton Street, Coatbridge ML5 3JF
("The Property")

The Parties: -

Mr Marc Roe and Mrs Natalie Roe, 57 Eglinton Street, Coatbridge, ML5 3JF
("the Applicant")

W.M. Cumming, Turner & Watt, 40 Carlton Place, Glasgow, G5 9TS
("the Respondent")

Tribunal Members:
Josephine Bonnar (Legal Member)
Carol Jones (Ordinary Member)

DECISION

The Respondent has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with sections 2.5, 6.1 and 7.2 of the Code of Conduct for Property Factors.

The decision is unanimous

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as "The Regulations"

The Respondent became a Registered Property Factor on 2 December 2012 and it's duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received on 29 March 2017 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondent had failed to comply with the Code of Conduct for property factors. The Applicant stated that the Respondent had failed to comply with sections 2.5, 6.1and 6.3 of the Code. On 11 April 2017, a letter was received from the Applicant intimating that they wished to amend the application to include a failure to comply with section 7.2 of the Code. The Applicant lodged an Inventory of documents with the application.

2. On 18 April 2017, the President referred the matter to a tribunal for a determination. A hearing was assigned to take place at Wellington House, 134 – 136 Wellington Street Glasgow on 15 June 2017.

3. On 22 May 2017, the Respondent submitted a request to postpone the hearing as the employee who dealt with the property in question was due to be abroad on leave at the time of the hearing. The tribunal considered the request, and the Applicant's objections to same, and thereafter granted the request. A fresh hearing was assigned for 4 August 2017 at Wellington House, 134 -136 Wellington Street, Glasgow. In advance of the hearing the Applicant lodged 2 further inventories of documents, photographs and written representations. The Respondent lodged an inventory of documents.

Hearing

4. The hearing took place before the tribunal on 4 August 2017. The Applicant Mrs Natalie Roe attended and confirmed that she was also attending on her husband's behalf, as he was unable to attend. Mr Neil Watt, a repairs manager with the Respondent, attended on their behalf.

5. Mrs Roe gave evidence in relation to the application. She advised that she has lived at the property for 16 years. Her property is an upper flat in a 2-storey tenement built around 1910. She stated that at the beginning of February 2016 a chimney at the property was damaged during a storm. She telephoned the Respondent to report the matter and at the same time reported a leak from a skylight in the close. She spoke to someone called Gillian, an employee of the Respondent. On 17 February 2016, she sent an email to the Respondent confirming the reported issues. The Respondent replied on the 18 February 2016 saying a contractor would be asked to investigate. When no action was taken by the Respondent, further emails were sent to them on 3 March and 11 April 2016. Brief responses were received which stated that a contractor had been instructed to investigate and provide an estimate. The Applicant did not pursue the matter over the summer months. On 29 September 2016, Mrs Roe sent an email to the Respondent asking for an update. She advised that the water ingress had caused plaster around the skylight to crack and fall onto ground causing a build up of wet debris on the floor. She also reported 2 new matters - a problem with the door to the close and a problem with the drains.

Her bath was not draining away and the Applicant thought that it was the communal pipes, rather than those inside the flat, which were at fault. This email was followed by telephone calls on 3 and 5 October 2016. A plumber instructed by the Respondent attended on 7 October and dealt with the drainage problem, which was in fact contained within the Applicant's flat. On 24 October 2016 Mrs Roe telephoned and spoke to the employee Gillian about the outstanding repairs. Gillian advised that the chimney and skylight had already been repaired and homeowners had been invoiced in August 2016. This statement was retracted in an email on 25 October 2016, Gillian advising that she had mixed up the repairs with those for another property. On 1 November 2016, a contractor attended at the property to deal with the complaint that the plaster debris and water ingress were making the stairs unsafe. He cleared some of the debris and removed loose plaster from around the skylight leaving walls and ceiling exposed. Mrs Roe did not consider the work carried out to be satisfactory and was of the view that it led to increased water ingress. On 14 November 2016, the Applicant telephoned the Respondent and sent an email on 16 November requesting an update. On 17 November 2016, a reply was received stating that Mr Watt had chased up the contractors who were to provide estimates. On 22 November, the Applicants received an email from Mr Watt which indicated that a contractor had quoted £280 for the chimney repair. A copy of the estimate was not attached and the email indicated that he had to obtain a second quote before he could progress matters. There was also a telephone conversation around this time between Mr Watt and Mrs Roe when he apologized for the delay and said he would attend to matters promptly. The Applicants waited until after the Christmas holiday period before emailing the Respondent on 10 January 2017. This email comprised a complaint about the failure to progress matters. In the email, the Applicant requested a copy of the complaints procedure, asked for timescales in relation to the outstanding repairs and intimated that they considered the Respondent to be in breach of the Code of Conduct. In the meantime, they had repaired the door themselves. In February 2017 Mr Watt met with one of the contractors on site and on 20 March 2017 he emailed the Applicant to advise that he had received an estimate from the contractor but it was not broken down into individual jobs so he had asked the contractor to do this before he issued the estimate to homeowners. On the 20 March 2017 the Applicant formally notified the respondent of their intention to apply to the tribunal and detailed the breaches of the code which they considered had taken place. On 9 May 2017 Mr Watt issued letters to all the homeowners enclosing 2 estimates for the repair to the skylight which would be divided among 10 properties, and 2 for the related repair work inside the close which would be divided among 4. No quote for the chimney repair was included. As at the date of the hearing no work had yet been carried out as most of the proprietors had not signed the mandate or paid their share of the cost. Reminders had been sent by the Respondent to the homeowners. No formal response to the complaint dated 10 January 2017 or the letter of 20 March 2017 intimating the intention to apply to the Tribunal have been received from the respondent.

6. Mrs Roe stated that the entire process had been time consuming, frustrating and stressful. She accepted that the current position was difficult and that the Respondent required to get authority and payment from the other properties

before instructing the work, However, the respondent had failed to make any progress in relation to the repairs reported between February 2016 and May 2017. In the meantime, she was of the view, that the damaged skylight had possibly deteriorated resulting in more expensive repairs being needed than was originally the case. However, she accepted that she has no technical knowledge or expertise in relation to such matters and no evidence that this is the case. Lastly, she advised the tribunal that the issue had affected their enjoyment of their property. She is reluctant to invite visitors because of the condition of the close. She and her husband had also recently decided that they would like to sell the property but feel that this is impossible while the repairs are outstanding.

7. Mr Watt did not dispute most of Mrs Roes evidence. He confirmed to the tribunal that he accepted what she had said in evidence and that the copy emails, correspondence and other documents were not disputed. He did not dispute that the repairs issues had been reported and were still outstanding. By way of explanation he advised that between February and October 2016 he had no specific knowledge of the case. An admin assistant, Gillian, had dealt with the Applicant's calls and emails. He indicated that she should have logged the repairs and that this ought to have led to estimates being obtained and issued to owners. He could not explain why this had not happened and as Gillian is currently on maternity leave he was unable to obtain her view of the matter. He has been aware of the case and responsible for same since October 2016. He explained that some of the delay since that date has been due to contractors failing to get back to him but this was not the only issue. He appeared to accept that the delays had for the most part been unreasonable, avoidable and inexcusable. He indicated that the chimney damage ought to have led to a claim on the block building insurance and he did not know why this had not happened. He stated that he would investigate whether that was still an option, but otherwise he was of the view that the Respondent should cover the cost of that repair, assuming £280 was an accurate estimate. He conceded also that the estimates issued to the homeowners in May 2017 did not include the chimney repair and for that he had no explanation to offer. Mr Watt advised that since he issued the estimates to homeowners only a couple have paid or confirmed that they will do so. He sent a reminder and has in the last few days issued a further reminder. He is unable to instruct the work without authority and payment. He indicated that the Applicant could contact the local authority regarding the matter as it may have certain statutory powers to force owners to get the repair carried out. He was unable to be more specific on this issue. As far as the claim from the Applicant that the repairs are costlier now than they would have been had the matter been actioned promptly in February 2016, he said he could not agree to that in the absence of any evidence in support of same. Mr Watt also accepted that the Applicant had complained about the Respondent's failure to progress the repairs and that this complaint had not been actioned in terms of the statement of services complaints procedure. In terms of the statement an initial response should be issued within 7 working days. Unresolved complaints are to be investigated by senior management who would provide comments within 2 weeks. In this case it is accepted that there has been no proper response and the complaint was not referred to senior management. The Applicant had wrongly assumed that Mr Watt was part of senior management. This is not the

case but he alone had dealt with correspondence and had not in fact addressed the complaint. Lastly, Mr Watt confirmed to the tribunal that he accepted that there may have been failures on the part of the Respondent which he considered to be breaches of the code of conduct.

The tribunal make the following findings in fact:

(i) The Applicant is the owner of the property and has resided there for 16 years.

(ii) The property is a one-bedroom upper tenement flat.

(iii) The Applicant is liable for one tenth of external common repairs and one quarter of common repairs which relate to the common close in which 4 properties are situated.

(iv) The Respondent is the Property Factor for the property.

(v) On various occasions between 3 February 2016 and March 2017 the Applicant reported a damaged chimney and water ingress from a defective skylight in the close. These reports were made by telephone and email to the Respondent.

(vi) On 9 May 2017, the Respondent issued letters and estimates for the work relating to the damaged skylight to the proprietors in the tenement and requested authority and payment to instruct the work. No estimate was provided or request for authority and payment was made in relation to the chimney.

(vii) The Applicant complained to the Factor about the delay in progressing the repairs on 10 January 2017. The complaint was not processed in accordance with the complaints procedure detailed in the statement of services.

(viii) The Respondent has not obtained payment from the majority of proprietors at the tenement to enable the work to be instructed.

Reasons for Decision

8. In her application, the Applicant states that the Respondent has breached Sections 2.5, 6.1, 6.3 and 7.2 of the Code. The Respondent accepted the facts of the case outlined by the Applicant. The Tribunal therefore considered whether those agreed facts gave rise to breaches of the sections of the Code which had been identified.

9. **Section 2.5. – "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to**

deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the statement of services" The first issue which the tribunal considered was whether the Respondent's actions amounted to a failure to respond to enquiries and complaints received by letter or email within prompt timescales, and as quickly and fully as possible. It is not disputed that the Respondent failed to act upon reports of repairs issues. It appears that, for the most part, there was some kind of response to emails and letters. However, the tribunal is of the view that in order to meet its obligations in terms of this section of the code the Property Factor has to show that it has done more than just acknowledge same. It is reasonable for a homeowner to expect that an enquiry about an outstanding reported repair would lead to a prompt response which actually provides information in relation to that enquiry. This was not the case. The tribunal is therefore of the view that the respondent has breached this section of the code in relation to the inadequate responses issued to the Applicant. Furthermore, it was accepted by Mr Watt in his evidence that the Respondent failed to process the Applicant's complaint in January 2017 in terms of the complaints procedure. It was evident from the Applicant's evidence that there had been a failure to respond to their complaint within prompt timescales. In fact, the Respondent did not address the complaint at all. Various emails from the Respondent referred to the issue of the outstanding repairs but did not acknowledge that a complaint had been received or provide any kind of response to same. The tribunal noted that the Respondents failures in relation to the reported repairs may also have amounted to breaches of other sections of Section 2 of the Code, and indeed to a failure to carry out property factor duties. However, these did not form part of the Application and therefore do not form part of the tribunal's decision. The tribunal concluded that the Respondent had breached this section of the code.

10. **Section 6.1. "You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners, a cost threshold below which job specific progress reports are not required"** The tribunal considered whether the failure by the Respondent to provide estimates for reported repairs from February 2016 until May 2017 amounted to a breach of this section, and in particular the requirement that a Property Factor inform homeowners of the progress of this work including estimated timescales for completion. It was established in evidence that the Respondent failed to provide any proper progress reports or timescales in relation to repairs which had been reported to them on numerous occasions over a 15-month period. The tribunal therefore concluded that the Respondent is in breach of section 6.1 of the Code.

11. **Section 6.3 "On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in house staff"** The tribunal then considered the Applicants claim that the respondent's failure to provide quotes for repairs amounted to a breach of this section. The Applicant relied on the requirement that Property Factors should be able to show why they

appointed contractors including cases where they decided not to carry out competitive tendering or used in house staff. The tribunal concluded that this section did not apply to the facts which were being relied upon, namely the failure to obtain quotes from contractors. The tribunal were of the view that this section imposed an obligation on the Property Factor to be able to justify the process used for selecting contractors rather that a failure on the part of the Factor to instruct anyone at all. The tribunal accepted that the Respondent had failed to obtain quotes and instruct contractors, but that failure did not amount to a breach of this section.

12. **Section 7.2 "When your in-house complaint procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. The letter should also provide details of how the homeowner may apply to the homeowner housing panel".** The tribunal considered whether the Respondent was in breach of this section of the Code. This section imposes an obligation on a property factor to process a complaint in terms of their complaints procedure and issue a final decision in relation to same which has been confirmed with senior management. The final decision should be in writing and should advise the homeowner may apply to the tribunal. It was accepted by Mr Watt that the Applicant's complaint was not processed in terms of the complaints procedure in the statement of services. He alone had responded to the letter containing the complaint and at no point had the complaint been referred to senior management. There had been no final response advising the Applicant of their right to apply to the tribunal. The tribunal concluded that there had been a breach of this section of the Code. The tribunal also noted that the complaints section of the statement of services is lacking in detail and fails to clearly articulate the process to be followed. For complaints about the Factor there is reference to an initial response and a final decision by senior management without any information as to what happens in between. The tribunal is of the view that this requires to be addressed by the respondent.

Proposed Property Factor Enforcement Order

The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

Appeals

A homeowner or property factor aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

J Bonnar

Legal Member

25 August 2017 Date

First-tier Tribunal for Scotland (Housing and Property Chamber)

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Chamber Ref: FTS/HPC/PF/17/0122

57 Eglinton Street, Coatbridge, ML5 3JF ("The Property")

The Parties: -

Mr Marc Roe and Mrs Natalie Roe, 57 Eglinton Street, Coatbridge, ML5 3JF ("the Applicant")

W.M. Cumming Turner & Watt, 40 Carlton Place, Glasgow G5 9TS ("the Respondent")

Tribunal Members:
Josephine Bonnar (Legal Member)
Carol Jones (Ordinary Member)

This document should be read in conjunction with the First-tier tribunal's Decision of the same date.

The First-tier tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The tribunal order the Respondent to pay to the Applicant the sum of £350 as compensation for her time, effort and inconvenience within 28 days of intimation of the Property Factor Enforcement Order.

(2) The tribunal order the Respondent to instruct and pay for the repair to the damaged chimney at the property insofar as the cost of same is not covered by the block insurance policy for the property within 56 days of intimation of the Property Factor Enforcement Order.

(3) The tribunal order the Respondent to review and revise its statement of services so that it comprises a more detailed complaints procedure including timescales for dealing with complaints within 56 days of intimation of the Property Factor Enforcement Order.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

J Bonnar

Josephine Bonnar,
Legal Member

25 August 2017 Date